

IN THE
Supreme Court Of The United States

OCTOBER TERM, 1979

No. **79-573**

RICHARD KAVNER,
Petitioner,

v.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA, A CORPORATION, LHI-688 EMPLOYEES RETIREMENT AND PENSION PLAN TRUST, PHILIP L. GOODWILLING, LEVI SANFORD, ERNST NEIDEL, PAUL AKERS, RONALD GAMACHE MICHAEL DUNN, KENNETH CARROLL, JAMES JOINER, CHICK THORNTON and JOHN BECKER.

Defendants.

**PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
for the Eighth Circuit**

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Petitioner Richard Kavner respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, No. 78-1638.

OPINION BELOW

The opinion of the District Court (Wangelin, J.) is not reported and is reprinted herein as Appendix A. The opinion of the Court of Appeals is not yet reported and is reprinted herein as Appendix B.

JURISDICTION

The opinion of the Court of Appeals was filed on June 1, 1979. Petitioner's timely petition for rehearing or transfer en banc was denied July 9, 1979. This petition for certiorari was filed within ninety days of July 9, 1979. The court's jurisdiction is invoked under 28 U.S.C. §1254(1).

PRELIMINARY STATEMENT

For over 25 years, Petitioner was the "top assistant" to Harold Gibbons, the chief executive of Teamsters Local 688. In January 1972, Petitioner applied for a pension from the Teamsters Local 688 Employees Pension Plan. Of the three Trustees of the Plan, the two who were eligible to vote thereon approved Petitioner's application.¹

Prior to Petitioner's retirement, the Trustees had entered into a contract with Defendant Occidental Life Insurance Company whereby Occidental agreed to "provide and guarantee" pensions for 688 employees. For purposes of this guarantee, the parties agreed upon the number of years of past credited service each employee had earned. After retirement, Petitioner began receiving his pension from Occidental.

In 1973, Gibbons was forced to resign.

In 1975, Occidental notified Petitioner that his pension was being taken away because he "never met the eligibility requirements." Petitioner was never offered a hearing as to his eligibility.

The Trustees serve at the pleasure of the head of the local union. The only Defendant-Trustee to testify at the trial stated that he took away Petitioner's pension because Petitioner had a "break in service" while on assignment to the International from 1958-63, and did not have a written "leave of absence" from Gibbons with regard thereto.

Gibbons and Kavner testified that, in 1958, Gibbons orally granted Kavner a "leave of absence" for his assignment to the

¹Petitioner, who was the third Trustee, properly abstained from voting on his own application.

International. The trial judge believed their testimony. It was not disputed that Gibbons had authority to grant such a leave.

The Pension Plan, which required a written leave of absence, was not adopted until 1968.

Petitioner's assignment to the International from 1958-63 was well known to the Trustees when they approved his pension in 1972.

The service credited to Petitioner by the Trustees and Occidental in their contract included the years 1958-63.

The District Court found that Petitioner had not suffered a break in service and ordered his pension restored; a panel of the Court of Appeals found this to be "clearly erroneous," and reversed outright.

QUESTIONS PRESENTED

1. Whether the conduct of a new set of Trustees of the union pension plan in cutting off petitioner's monthly pension payments, on grounds other than fraud, three years after his retirement, is contrary to established principles of law, and particularly to the law of the State of Missouri, when the pension had been properly authorized by predecessor trustees?

2. Whether the opinion of the Eighth Circuit Court of Appeals is in conflict with established principles of law in holding:

A. That it was proper for the new trustees to apply retroactively a requirement of the pension plan for written leave of absence to petitioner's oral leave of absence officially granted him, and relied upon by petitioner when he acceded to assignment to the International union, ten years before the plan came into being;

B. That such retroactive application did not constitute an unreasonable discrimination between those employees who did, and those who did not, receive leaves of absence in writing before any pension plan existed;

C. That the Trustees who adopted the pension plan and approved petitioner's pension abused their discretion in determining that the provision of the plan requiring written leave of absence was to be applied prospectively;

D. That such retroactive application permits the new trustees legally to demand re-payment from petitioner of the pension he has received?

3. Whether the opinion of the Eighth Circuit Court of Appeals is contrary to established principles of law, and particularly to the law of the State of Missouri, in relieving Occidental of its contractual acceptance of petitioner's years of service and guarantee of his pension based on those years of service, without petitioner's consent?

**CONSTITUTIONAL PROVISIONS, TREATIES,
STATUTES, ORDINANCES OR REGULATIONS**

None.

STATEMENT OF THE CASE

The Factual Background

In 1968, Teamsters' Local 688 established a pension plan for its employees. One of the Plan's eligibility requirements was twenty years of "credited service" (P1. Exh. ²).

On March 15, 1971, the Trustees of that plan signed a contract with defendant Occidental whereby the Trustees agreed to forward all of Local 688's contributions to Occidental, and Occidental agreed to pay benefits due under the plan (Find. Fact 1, App. 20 ³). In this contract, the Trustees and Occidental agreed "that the information and data contained in Exhibit B as such Exhibit appears at the Contract Date, shall be binding and conclusive" (App. 449). Exhibit B credited Petitioner with over twenty years of service with Local 688 ⁴ (App. 457).

Petitioner retired on January 1, 1972 (Find. Fact 2, App. 20). At the time of his retirement, he was one of three Trustees of the pension plan. Shortly before his retirement, his application for a pension was approved in writing by Trustee-Defendant Goodwilling and the third Trustee (P1. Exh. 24 [Appendix C hereto], App. 471-72). Following his retirement, he began receiving a pension, and continued to do so until May 1975, when he received the following letter from Defendant Occidental:

²Plaintiffs' Exhibit.

³Finding of Fact 1, Joint Appendix 20.

⁴A separate issue with regard to Petitioner's starting date is not included in the Questions Presented herein.

The Contractholder [the Trustees] has now notified Occidental that you were not entitled to receive the annuity payments which Occidental made to you because you never met the eligibility requirements specified in the Plan. Further, the Contractholder has directed us to advise you that no more annuity payments will be made you under the Contract.

“Additionally, the Contractholder has directed us to make demand upon you to repay all of the annuity payments that we have made to you under the Contract. Please make such repayment in the amount of \$49,200 directly to the Trustees of the LHI-688 Employees Retirement and Pension Plan Trust.”

(Pl. Exh. 8, App. 461).

Petitioner never received any communication from the Trustees. No hearing was ever offered or held (App. 371).

In 1976, Petitioner filed this suit against the Trustees, the members of Local 688, and Occidental. In the Trustees' answer, Petitioner learned for the first time that the Trustees were contending that he had suffered a “break in service” while on temporary assignment to the International Headquarters in Washington.

In 1958, Harold Gibbons, the Secretary-Treasurer and head of Local 688, and James Hoffa, the International President, assigned Petitioner to Washington for temporary duty with the International (App. 42, 148). The testimony of both Petitioner and Gibbons that Petitioner asked for and received an oral leave of absence from Gibbons was undisputed, and was accepted by the District Court (Find. Fact 10; App. 23, 42, 147-48). In fact, Gibbons testified that:

“When he was sent I wanted him to come back or else I never would have assigned him, . . . Developing leadership

under any situation is difficult at best. When you have a good man you don't let him go."

(App. 148). Even the defendants admitted that Gibbons had the authority to grant a leave of absence (App. 407).

At the time Petitioner was granted an oral leave of absence there was no pension plan, and the validity of an oral leave of absence had never been questioned.

Petitioner testified that, while on assignment to the International, he did work for Local 688: "I would be in a lot of times Monday and Friday and not full days. I would do a lot of week-end work. . . . [I]t was just a continuous thing" (App. 43). Gibbons also testified to Petitioner's work for the local while he was on assignment to the International:

"[H]e was working on 688 business while he was in the City of St. Louis, which could have been two or three days a week or less maybe, but he was also working on St. Louis business when he would be in Dubuque, Iowa or as long as wherever he's at the end of a telephone. He was constantly being consulted on problems facing St. Louis. He was taking assignments from myself or helping some staff member who needed to put up a picket line in Louisville, Kentucky or things of that sort I know that Dick Kavner put in many, many hours . . . in the cause of 688."

(App. 159-60).

In a letter written to Local 688's attorney in 1967 concerning Petitioner's services to the local while with the International, the Comptroller of the local stated that Petitioner:

"1. Supervised all negotiations and personally handled all serious negotiations; handled membership meetings; consulted with officers and business agents by phone and met with them out of town on local union problems.

“2. Approximately 1500 hours each year was devoted to Local 688 business.”

(Pl. Exh. 32, App. 474).

The trial court believed the testimony of Petitioner and Gibbons: “While Kavner was on assignment to the International he performed substantial services for Local 688” (Find. Fact 10, App. 23).

Gibbons also testified that Petitioner’s work with the International Union of Teamsters” was “[a] great value to our organization” (Local 688) (App. 149). The trial judge also believed Gibbons’ testimony on this subject: “Kavner[’s] . . . service to the International was of value to Local 688” (Find. Fact 10, App. 23).

During the years 1958-63, Petitioner continued to pay his dues to the local, and 688 maintained a “key man” policy on Petitioner’s life (App. 347, 373).

Defendant-Trustee Goodwilling was employed by Local 688 during the time Petitioner was on assignment to the International, and was very much aware of the assignment when he signed the contract with Occidental in 1971 which credited Petitioner with service for this period, and when he approved Petitioner’s pension in 1972 (App. 315, 387-88). In fact, Goodwilling himself prepared a document in 1970 which included credit for these years (App. 349-50; A.O.O. Exh. ⁵ RR).

After Gibbons was forced out by Gamache, who succeeded him, Goodwilling “determined,” for the first time, that the requirement in the plan that a leave of absence be in writing should have retroactive application to leaves granted before the plan was in existence. He admitted that Gamache could fire him without cause but claimed his new interpretation was independently arrived at by him (App. 355).

⁵Exhibit of Appellants Other than Occidental.

The trial judge made a specific finding that he did not believe Goodwilling (App. 23).

The Procedural Background

Petitioner filed his suit in the Circuit Court for the City of St. Louis, State of Missouri, alleging both a common-law count under state law and a count under ERISA (Employees Retirement Income Security Act, 29 U.S.C. §§1001 *et seq.*). The Petition was removed by defendants on the basis of the ERISA count. The trial court's decision was not based upon ERISA, and no issue is raised with regard to that act herein.

The District Court found that the Trustees and the members of the local union had breached their contracts with Petitioner, and that Defendant Occidental was guilty of breach of contract, breach of fiduciary duty, actuarial malpractice, and fraud. In so ruling, the trial court made a specific finding that Petitioner "did not have a 'break in service' from 1958 through 1963 as that term is used in the" pension plan (Find. Fact 10, App. 23).

The Court of Appeals held that this finding was "clearly erroneous" and reversed the judgment (Sl. Opin.⁶ 31-33). Defendants are now seeking judgment in the District Court for \$70,000 on their Counterclaim.

REASONS FOR GRANTING THE WRIT

I

The Conduct Of A New Set Of Trustees Of The Union Pension Plan In Cutting Off Petitioner's Monthly Pension Payments, On Grounds Other Than Fraud, Three Years After His Retirement, Was Contrary To Established Principles Of Law, And Particularly To The Law Of The State Of Missouri, When The Pension Had Been Properly Authorized By Predecessor Trustees.

Petitioner retired in 1972 and began receiving his pension. Over three years later, without notice, hearing, or explanation, it was cut off. Only after he filed suit did he learn that the Trustees contended that he had suffered a "break in service" while on assignment to the International because the leave of absence granted to him by his employer had not been reduced to writing. The Trustees who approved his pension had been well aware of his assignment to the International, and had raised no question as to his eligibility.

Petitioner's assignment to the International, and oral leave of absence with regard thereto, occurred in 1958, when there was no pension plan and no requirement that a leave of absence had to be in writing. The pension plan was not written until 10 years after. However, defendants interpreted the provision therein requiring written leave of absence to be retroactive. The District Court rejected this interpretation and restored Petitioner's pension. The Court of Appeals held this finding to be "clearly erroneous," and affirmed the Trustees' right retroactively to deprive Petitioner of his pension.

*Slip Opinion.

"Under established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n.20, 30 L.Ed.2d 341, 358 N.20 (1971). Missouri law applies to this issue. Under Missouri law, a voluntary, non-contributory private pension plan becomes an enforceable contract if there is "notification to and knowledge of the benefits on the part of the employee and consideration or continuance of employment in reliance upon the plan." *Molumby v. Shapleigh Hardware Co.*, 395 S.W.2d 221, 226 (Mo.Ct.App. 1965).

Further, an employee who retires in reliance upon a pension plan has a right to receive the promised benefits. *Feinburg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo.Ct.App. 1959). There is no question that an employee's rights are vested as a matter of law "once he begins to receive benefits thereunder." *Molumby v. Shapleigh Hardware Co.*, *supra* at 226.

In their brief in the Eighth Circuit, with regard to a totally different issue than that involved in this petition, defendants in this case themselves set forth the standard for judicial review of the interpretation placed on a pension plan by the Trustees thereof: "The interpretation of Trustees as to the meaning and intent of the Trust Agreement plan documents must be given great weight, absent a showing that the Trustees interpretation is clearly arbitrary, capricious, or unreasonable" (A.O.O. Br.⁷ 19). A "long-standing interpretation and practice by the Trustees is to be given substantial if not controlling consideration in any analysis of the intent of the agreement as expressed by the words of the written documents." *Miracle v. United Mine Workers*, 373 F. Supp. 603, 604 (D.D.C. 1974).

The difficulty with the position of the Court of Appeals is that it accepted an interpretation of the plan adopted by

⁷Brief of Appellants other than Occidental in the Eighth Circuit.

Defendant-Trustee Goodwilling in 1975 solely and exclusively for the purpose of depriving this Petitioner of his pension, and ignored the interpretation which had prevailed to that time. In 1970, with full knowledge that Petitioner had been on assignment to the International from 1958-63, Goodwilling himself prepared a list of service dates which credited Petitioner with past service which included the years 1958-63. In 1971, all three Trustees, including Petitioner and Defendant-Trustee Goodwilling, signed a contract with Occidental which included a schedule (Exhibit B) that credited Petitioner with service for those years. In 1972, Defendant-Trustee Goodwilling and Trustee John Naber (not a party to this lawsuit) approved Petitioner's application for a pension, with full knowledge of Petitioner's service to the International. The interpretation of the predecessor Trustees was entitled to at least as much judicial deference as that of Defendant-Trustee Goodwilling in 1975.

Defendant-Trustee Goodwilling tried to cast doubt on the impartiality of his decisions in 1971 and 1972 with testimony that he had voted for Petitioner's pension because he was "afraid of losing" his "job." The trial judge removed any question of the validity of the Trustees' original vote to grant Petitioner a pension with a specific finding that he did not believe the testimony of Defendant Trustee Goodwilling.

The result of the decision of the Court of Appeals simply boils down to this: The Trustees granted Petitioner a pension in 1972 and took it away three years later for no reason other than that they had changed their mind on the interpretation of the plan. Defendants have not cited a single case to either the District Court or the Court of Appeals where such arbitrary and capricious conduct has been approved. The Court of Appeals cited no authority to support this result.

The closest that any pension fund trustees have ever come to taking away a retiree's pension for reasons other than fraud is the situation where such trustees have attempted to change

eligibility rules retroactively after an employee has met all of the eligibility requirements but either has not yet retired, or has not been awarded his pension. In every one of those instances, the courts have held that it was too late to change the rules with regard to such employees. *Norton v. I.A.M. National Pension Fund*, 553 F.2d 1356 (D.C.CIR. 1977); *Lavelle v. Boyle*, 444 F.2d 910 (D.C. Cir. 1971); *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1962); *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962); see *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972). At the very least, the opinion below is in conflict with these decisions.

The danger of the precedent set by the Court of Appeals opinion is that it turns the power to control the pensions of former officers and employees of labor unions into a tool for revenge in the hands of their successors. There is ample reason in the record to believe that that is exactly what happened here. Harold Gibbons had been the executive head of Local 688, and a powerful figure in the International for 25 years (App. 143). He was deposed ("resigned") and replaced by Defendant Gamache in a "palace revolt" in 1973 (the year after Petitioner retired) (App. 406-407, 420). Petitioner had been Gibbons' "top assistant" (App. 148). It takes no great flight of imagination to appreciate that Gibbons' "successors" do not harbor kind feelings toward his former "top assistant." Whether or not this is true in the instant case, it is unconscionable to place a retired pension beneficiary at the mercy of former political opponents by allowing them to "change the rules" and take away his pension long after he has retired. The Trustees of Local 688's pension plan serve at the pleasure of the head of the union, as do all of the officers and employees (App. 355, 460). The decision of the Eighth Circuit, if allowed to stand, permits and invites union officers to use the pensions of retired union officers and employees as an instrument for political retaliation and retribution. Such a decision must not be permitted to remain on the books.

Although the situation is most likely to arise where the retired pension recipients are former political opponents, the opinion below is obviously not so limited, and actually threatens the stability of all pensions. If a pension is not secure after three years, when is it ever secure? If the opinion below is permitted to stand, no retired pension beneficiary may ever again feel secure that the Trustees who control his pension may not change their mind, or that new trustees will not have a different opinion, with regard to his eligibility, and thereby deprive him thereof.

Thus, with regard to the first question, the writ should be granted because the decision below is contrary to established law regarding pensions, and is in conflict with decisions in other circuits. The question is important because it affects the rights of retired pension beneficiaries everywhere.

II

The Opinion Of The Eighth Circuit Court Of Appeals Is In Conflict With Established Principles Of Law In Holding:

A. That It Was Proper For The New Trustees To Apply Retroactively A Requirement Of The Pension Plan For Written Leave Of Absence To Petitioner's Oral Leave Of Absence Officially Granted Him, And Relied Upon By Petitioner When He Acceded To Assignment To The International Union, Ten Years Before The Plan Came Into Being;

B. That Such Retroactive Application Did Not Constitute An Unreasonable Discrimination Between Those Employees Who Did, And Those Who Did Not, Receive Leave Of Absence In Writing Before Any Pension Plan Existed;

C. That The Trustees Who Adopted The Pension Plan And Approved Petitioner's Pension Abused Their Discretion In Determining That The Provision Of The Plan Requiring Written Leave Of Absence Was To Be Applied Prospectively;

D. That Such Retroactive Application Permits The New Trustees Legally To Demand Re-payment From Petitioner Of The Pension He Has Received.

A. When Petitioner was assigned to the International, he relied upon Gibbon's oral leave of absence for the assurance that he would not lose any 688 benefits by reason of accepting the assignment (App. 42). It is totally arbitrary and capricious to penalize Petitioner because he and Gibbons failed to divine that, ten years later, a pension plan would be adopted requiring written leaves of absence.

The trial judge found that Petitioner had Gibbon's oral grant of leave of absence. Surely, it cannot be gainsaid that it would not have been written if, under the wildest flight of imagination, the failure of Gibbons to write "leave of absence granted" would be the basis of revocation of a vested pension. A plan interpretation which is arbitrary, or capricious, or unreasonable, or adopted in bad faith, or an abuse of discretion, cannot be permitted to stand. *Roark v. Boyle*, 439 F.2d 497 (D.C. Cir. 1970); *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968). The opinion below has sanctioned just such an interpretation.

B. Defendant-Trustee Goodwilling's 1975 interpretation that the written leave of absence clause was retroactive means that those employees who were on assignment elsewhere prior to adoption of the plan, and happened to obtain written memorialization of their leaves of absence will receive their pensions, and those similarly situated who were orally accorded such leaves will not. There is simply no rational basis for such discrimination.

C. The trial court upheld the decision of the Trustees who approved Petitioner's pension with full knowledge of his assignment to the International. The Court of Appeals reversed. This can only mean that the Court of Appeals found, without actually saying so, that these Trustees acted arbitrarily and capriciously. Significantly, these were the very Trustees who adopted the

plan containing the requirement of written leave. Their interpretation of this provision as being prospective only was certainly entitled to "great weight." Yet, the Court of Appeals afforded it no weight, thereby effectually stripping the original Trustees of their discretionary power to interpret the written leave of absence provision as prospective. On this issue, the Court of Appeals opinion was bereft of authority. In finding that the trial court's approval of the interpretation of the original Trustees was "clearly erroneous," and choosing instead Defendant-Trustee Goodwillig's readings, the Court of Appeals overlooked the political motivation behind the new Trustees' action, ignored the inviolable nature of a pension already awarded, and has thereby made the concept of "vested pension rights" a quicksand for retirees.

D. The Trustees are not satisfied with cutting off Petitioner's pension. They have sought, and are still seeking, to recover all of his pension payments, plus interest. In light of Petitioner's reliance upon Gibbons' oral leave of absence in accepting the assignment to Washington, and his reliance upon the acceptance of his service dates by the first trustees both as to continued employment and retirement, it is simply incredible that he should be called upon to return over three years of pension payments, with interest—further demonstrating the political and retaliatory nature of the action of the second set of Trustees, which has been sanctioned by the Court of Appeals.

III

The Opinion Of The Eighth Circuit Court Of Appeals Is Contrary To Established Principles Of Law, And Particularly To The Law Of The State Of Missouri, In Relieving Occidental Of Its Contractual Acceptance Of Petitioner's Years Of Service And Guarantee Of His Pension Based On Those Years Of Service, Without Petitioner's Consent.

In 1971, the Trustees and Occidental agreed that Petitioner's "credited service" included the years during which he was on

assignment to the International. In reliance upon this agreement, and in expectation of his pension, Petitioner continued to work for the union. In 1972, in reliance upon this contract, and the promises of the Trustees and Occidental that he would receive a pension, Petitioner retired. In 1975, the Trustees repudiated this provision in the contract, and Occidental acceded thereto.

Under Missouri law, Petitioner was a third-party beneficiary to this contract, and was entitled to enforce his rights thereunder, *e.g.*, *Silton v. Kansas City*, 446 S.W.2d 129 (Mo. 1969). Missouri law also provides that an employee's pension rights are vested, and unalterable, as a matter of law "once he begins to receive benefits thereunder." *Molumby v. Shapleigh Hardware Co.*, *supra* at 226. The District Court found that, by cancelling Petitioner's pension, the Trustees and Occidental breached his rights as a third-party beneficiary to the contract. The Court of Appeals held that, even though three years had elapsed since Petitioner's retirement, the Trustees and Occidental had the right to alter the contract and withdraw credit from Petitioner for the years that he was assigned to the International.

The ruling of the Court of Appeals is clearly contrary to the applicable state law. Petitioner filed his lawsuit in the state courts. It is clear that these courts would have enforced the contract. The case was removed by the defendants. The purpose of the removal provisions is not to produce a different result—yet, that is precisely what happened here. The Court of Appeals decision is directly contrary to applicable state law.

CONCLUSION

When Petitioner retired, the Trustees and Occidental approved his pension with full knowledge of the facts concerning his temporary assignment to the International Union. Three years later, a second set of Trustees overruled their predecessors and revoked Petitioner's pension. The only thing that changed during those 3 years was the Union officer who appointed the Trustees.

If the opinion of the Court of Appeals is not reviewed by this Court, pension rights will rest upon the shifting sands of union politics or the different interpretations of different Trustees. The reach of the opinion is not confined to the thousands of union pensions. Its unsettling effect permeates pensions of every kind.

Once universally accepted principles governing the vesting of pensions, the discretion to be exercised by Trustees, and the rights of third-party beneficiaries are now murky. Only action by this Court can restore the certainty and clarity which has been shattered by the opinion below.

Respectfully submitted,

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APPENDIX



APPENDIX "A"

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Charles Saffo, et al.,

Plaintiffs,

v.

Occidental Life Insurance

Company of California et al.,

Defendants.

Consolidated Cases

No. 76-172 C (2)

No. 76-201 C (2)

JUDGMENT

(Filed June 29, 1978)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs have judgment against defendants on plaintiffs' complaint in an amount to be determined later; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants pay the costs of this action.

Dated this 29th day of June, 1978.

/ s / _____

H. Kenneth Wangelin

United States District Judge

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Charles Saffo, et al.,

Plaintiffs

vs.

Occidental Life Insurance

Company of California et al.,

Defendants.

Consolidated Cases

No. 76-172 C (2)

No. 76-201 C (2)

MEMORANDUM

Filed

June 29, 1978

These consolidated actions concern the reduction or elimination of pension payments to three retired employees of the Warehouse and Distributors Workers Union, Local 688 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Defendants are Occidental Life Insurance Company of California (Occidental), the Trustees of the Pension Plan established for employees of both Local 688 and the St. Louis Labor Health Institute (LHI) and Local 688. Plaintiffs Gibbons and Kavner are former officers of Local 688 and plaintiff Saffo is a former employee who was not an officer.

The Court has jurisdiction over these actions pursuant to 29 U.S.C. § 1132. A fairly lengthy non-jury trial was had and the Court has reviewed the entire record. Basically the issue before the Court is whether the Trustees acted appropriately in reducing plaintiffs' pension benefits to attempt to qualify as a tax exempt pension plan. After consideration the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. In 1965 Local 688 established a pension plan for its employees. On March 15, 1971 the Trustees of that plan signed a contract with Occidental whereby the Trustees agreed to forward all of Local 688 contributions in an agreed upon amount of Forty Dollars per week per active participant, to Occidental. Occidental agreed to pay benefits due under the plan. Under the plan monthly retirement benefits were calculated at Forty Dollars times years of credited service.

2. Kavner retired on January 1, 1972. Based upon a service date in exhibit B to the contract, he had thirty years of credited service, which entitled him to a pension of Twelve Hundred Dollars per month. Occidental paid him this amount from January 1, 1972 through April, 1975 when he was cut off entirely. Saffo retired on August 3, 1973 with twenty years credited service, and began receiving a pension of Eight Hundred Dollars per month. Beginning in November of 1975 his pension was reduced to Two Hundred Ninety Six Dollars and Four Cents (\$296.04) per month. Gibbons retired on August 1, 1973 and, based upon a service date on Exhibit B to the plan, he received Twelve Hundred Dollars per month. From May, 1975 through October, 1975 his check was reduced to Nine Hundred and Sixty Dollars (\$960.00) per month. In November, 1975, his check was further reduced to Three Hundred Sixty One Dollars and Five Cents (\$361.05) per month. The Trustees have made all payments due under their contracts with Occidental.

3. Local 688 employees were notified of the details of the plan. Each of the plaintiffs continued his employment in reliance upon his right to receive a monthly pension calculated at Forty Dollars times his years of credited service, and each of them retired in reliance on the same. The employees of 688, including the three plaintiffs, agreed to forego a salary increase in order to fund their pensions.

4. Occidental agreed to "provide and guarantee" the pensions of all persons listed on exhibit B to the plan, including these plaintiffs. This guarantee was effective the day the contract was signed. Occidental's representations to the Trustees were calculated to lead them to believe, and did cause them to believe, that the guarantee was effective the day the contract was signed.

5 The 688 pension plan, excluding Occidental's guarantee, has never been actuarially sound under the actuarial assumptions used by Occidental. There is just no reasonable likelihood that contributions for 688 participants at the rate of Forty Dollars per week per active participant will ever be sufficient to pay pensions for 688 retirees given the actuarial assumptions used by Occidental. Under those assumptions on January 1, 1974 Occidental had incurred an actuarial liability of One Million Sixty Seven Thousand Dollars (\$1,067,000.00) on its guarantee.

6. Because Occidental had guaranteed the pensions of Kavner and Gibbons, the Trustees' actions in cutting off Kavner's pension and reducing Gibbons' pension were of no benefit to any other plan participant. Occidental did not inform the Trustees of this fact.

7. Because of its guarantee and because it could not require increased contributions to pay exhibit B participants, Occidental was a risk taker and not a mere stakeholder. It took the risk of having to pay out more in pension than it received in contributions, and it stood to profit from high employee turnover by having the use of the pension fund for a longer period of time. Under its guarantee, proper artuarial practice required Occidental to maintain separate accounts for exhibit B and non-exhibit B participants, and to show its valuations on these accounts separately in its actuarial reports.

8. Because they could be removed by the union's officers, without cause, from their positions as Trustees, and because they were union employees who could be fired without cause, the Court finds that the Trustees were under the domination and control of the union and that their acts were the acts of the union.

9. The Court finds that it was not reasonable for the Trustees to believe that certain language in a letter from the district director of the Internal Revenue Service "required" them, in order to maintain the plan's qualification, to reduce benefits in an amount sufficient to make a plan be actuarially sound. However, even if the Trustees had believed that this letter required them to raise contributions there were several alternatives that should have been pursued. For example, it was not reasonable for them to divest plaintiffs of their pensions without appealing such an order within the IRS. It was not reasonable for them to divest plaintiff's of their pensions without first seeking to require the union to make sufficient contributions to pay the pensions in accordance with its agreement. It was unreasonable for the Trustees to reduce benefits retroactively, rather than prospectively only, without first attempting to demonstrate to the IRS that a reduction which was prospective only was justifiable as a "business necessity". Finally, the Trustees acted unreasonably because an unknown portion of the reduction in benefits was attributable to changes in the plan which were not required by the IRS.

10. When Kavner was assigned to the International Union in 1958 he was given a "leave of absence" from Local 688 by Gibbons, the executive head of the Local, who had such authority. While Kavner was on assignment to the International he performed substantial services for Local 688. Also, his service to the International was of value to Local 688. For these reasons he did not have a "break in service" from 1958 through 1963 as that term is used in plan B.

11. Kavner was not guilty of fraud in placing on his retirement application the number of years of credited service to which he was entitled under the terms of the contract. Nor was he guilty of fraud in negotiating with Occidental a service date which included the period during which he was on assignment to the International.

12. There was no indication that Trustee Goodwilling¹ acted with the approval of the other Trustees in eliminating Kavner's pension. Even if the majority of the Trustees did concur their action was arbitrary and capricious because they did so without a hearing.

13. In 1949 Gibbons was the chief executive officer of an independent union known as the Joint Counsel which he merged with Local 688. The combined union was also known as Local 688 but was under Gibbons' leadership. His service date on exhibit B includes credit for his years as head of the Joint Counsel. Where there is a merger of two unions, it is in the best interests of both unions that the resulting entity recognized the service credits of the employees of both of the merging unions.

14. Gibbons did not commit any fraud with regard to his service date on exhibit B or with regard to the years of credited service on his application for a pension.

15. In its actuarial reports to the Trustees, and in the valuation summary submitted to the IRS, Occidental showed its own liability of One Million Sixty Seven Thousand Dollars (\$1,067,000.00) on its guarantee as being part of plan B's unfunded actuarial liability. There is no evidence that Occidental ever informed either the Trustees or the IRS that its statement of plan B's unfunded actuarial liability included its own liability for the guarantee. Because they showed Occidental's liability as

¹ The Court did not credit Goodwilling's testimony.

part of the fund's liability, the actuarial reports and valuation summary were misleading, deceptive and inaccurate. In submitting actuarial reports and a valuation summary which showed its own liability as a liability of the fund, Occidental failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by actuaries.

16. The misleading valuations shown on the valuation summary submitted to the IRS caused the district director of the IRS to question the actuarial soundness of plan B. This in turn caused the adoption of Amendment 4 which divested plaintiffs of their pensions.

17. In preparing a proposal for the Trustees as to the amount of reduction in prospective benefits it would require as a condition of adding the additional features to the plan which the Trustees desired, Occidental gave no credit for the amount by which its liability on the guarantee would have been reduced. Amendment 2, if it had gone into effect, would have substantially reduced Occidental's liability on its guarantee. Occidental withheld this information from the Trustees. The IRS then found that Amendment 2 would have constituted a "partial termination" of the plan, which would have disqualified it, because the actuarial value of the "improvements" was substantially less than the value of the cash benefits lost.

18. Amendment 4 reduced Occidental's liability to exhibit B participants by over Eight Hundred Thousand Dollars (\$800,000), which fact Occidental did not tell the Trustees. In failing to disclose to the Trustees that Amendment 4 would reduce its own liability by over Eight Hundred Thousand Dollars (\$800,000), Occidental failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by actuaries. The submission to the Trustees of valuation summaries, which Occidental claimed showed the amount of reduction necessary to both fund the "improvements" in Amendment 4 and make plan B actuarially

sound, without informing the Trustees that the amendment would reduce Occidental's liability by over Eight Hundred Thousand Dollars, (\$800,000) constituted a material misrepresentation. Occidental knew the representation to be false, and intended for the Trustees to act upon it. The Trustees were ignorant of the truth, and relied upon the misrepresentation to the injury of the beneficiaries.

19. In reducing its payments to Gibbons and Saffo, and stopping payments to Kavner, Occidental committed breaches of contract. In permitting the Trustees to change plaintiffs' payment Local 688 committed breaches of contract. In directing Occidental to change payments to plaintiffs the Trustees acted in violation of the plan and the trust agreement.

20. In failing to inform the IRS that it had guaranteed over One Million Dollars of what it showed as the unfunded actuarial liability of plan B, Occidental was guilty of actuarial malpractice and breach of its contract to provide actuarial services and reports. In failing to inform the Trustees that Amendment 4 would reduce its own liability by over Eight Hundred Thousand Dollars (\$800,000), Occidental was guilty of fraud, malpractice, breach of fiduciary duty and breach of its contract to provide services and reports.

Conclusions of Law

The theories of liability in this action are based upon the pension plan and the duties held under it by Occidental and the Trustees. The plaintiffs, having relied upon the existence of the plan in several ways, are entitled to enforce it. Plaintiffs' rights were vested and could only have been changed in accordance with the term of the plan and various statutory requirements.

The plan provided an unusual feature. In return for receiving custody of the fund, Occidental guaranteed the possession (pen-

sion) payments of “exhibit B” employees beyond the contributions made on their behalf. Thus in determining the solvency or “actuarial soundness” of the fund, the guarantee had to be considered. It was not considered, in part because of Occidental’s misrepresentations and in part because of the Trustees failure to perform their duties diligently. Local 688 must share the responsibility for the Trustees’ breach of duty because it controlled them so closely.

The reductions based upon changes in service dates will not be discussed in detail. The evidence simply does not support the service dates suggested by the Trustees for either Kavner or Gibbons.

There may be circumstances where Trustees of a pension plan, acting to protect its tax exempt status, could reduce benefits. This is not such a case. The pressure exerted on Local 688 and the Trustees by the IRS was in large part due to misinformation. Further, the reaction to that pressure was not reasonable. Thus it must be concluded that defendants should have continued to pay plaintiffs’ pensions at the rates used in 1972, 1973 and 1974.

The question of damages presents greater problems. Plaintiffs seek a lump sum representing the present value of their benefits. The Court is more inclined to order payment of back benefits due and declare the rights of the parties under the pension plan, ordering continued payments. In any event, the parties (through counsel) are ordered to meet within twenty (20) days of this date to attempt to agree upon a proper amount of damages. They should report their efforts to the Court. If agreement cannot be reached, further briefs limited to that issue should be filed within thirty (30) days of this date. Plaintiffs also seek attorneys’ fees and punitive damages. The Court does not consider punitive damages appropriate. However, plaintiffs are awarded attorneys’ fees pursuant to 29 U.S.C. §1132(g).

The parties are instructed to attempt to agree on an appropriate amount under the procedure stated above.

Dated this 29th day of June, 1978.

/s/ _____
H. Kenneth Wangelin
United States District Judge

APPENDIX B

Unites States Court of Appeals
For the Eighth Circuit

No. 78-1634

Charles Saffo, Richard Kavner and
Harold J. Gibbons,

Appellees,

v.

Occidental Life Insurance Company
of California, a Corporation.

LHI-688 Employees Retirement and
Pension Plan Trust; Philip L Good-
willing; Levi Sanford; Ernest Neidell;
Paul Akers; Ronald Gamache;
Michael Dunn; Kenneth Carroll;
James Joiner; Chick Thornton; and
John Becker,

Appellants.

No. 78-1638

Charles Saffo, Richard Kavner and
Harold J. Gibbons,

Appellees,

v.

Occidental Life Insurance Company
of California, a Corporation,

Appellant.

Appeal from the
United States
District Court for
the Eastern District
of Missouri.

LHI-688 Employees Retirement and Pension Plan Trust; Philip L. Goodwilling; Levi Sanford; Ernest Neidell; Paul Akers; Ronald Gamache; Michael Dunn; Denneth Carroll; James Joiner; Chick Thornton; and John Becker.

Submitted: February 14, 1979

Filed: June 1, 1979

Before HEANEY and McMILLIAN, Circuit Judges, and BENSON, Chief Judge.

HEANEY, Circuit Judge

Charles Saffo, Richard Kavner and Harold J. Gibbons, retired beneficiaries of the LHI-688 Employees Retirement and Pension Plan Trust, brought this action against the trustees of the Plan, the officers of Teamsters Local Union No. 688,¹ and Occidental Life Insurance Company of California, alleging that their pension benefits were unlawfully curtailed or terminated. After a nonjury trial, the trial court found in favor of the appellees on the substantive issues. It reserved entry of a monetary award pending further consideration. On appeal, the trustees of the Plan, the officers of Local 688 and Occidental argue that the trial court erred in its interpretation of the Plan documents and that several of its factual findings are clearly erroneous. For the reasons outlined below, we affirm in part, reverse in part and remand for further proceedings.

* PAUL BENSON, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

¹ The officers of Local 688 were sued as class representatives of the Union membership. Local 688 is affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

I.

Factual History

In 1968, Harold Gibbons directed Richard Kavner to develop a joint pension program for Local 688 and the St. Louis Labor Health Institute (LHI). LHI is a nonprofit organization providing medical benefits to union members and is supported by a number of Teamsters' locals, including Local 688. It was established under Gibbons' leadership. During the period that the pension program was under development, Gibbons was Secretary-Treasurer and Chief Executive Officer of Local 688. Kavner, Gibbons' assistant, was supervisor of fringe benefits. LHI and Local 688 subsequently adopted an Agreement and Declaration of Trust which established the LHI-688 Employees Retirement and Pension Plan, effective January 1, 1968.² Under the provisions of the agreement, the trustees agreed to administer, under a single trust, contributions made on behalf of LHI and Local 688 employees. The agreement, however, contemplated that there would be two separate pension plans—Plan A for LHI employees and Plan B for Local 688 employees.³ In separate determination letters, the Internal Revenue Service (IRS) held that each plan was a qualified plan under 26 U.S.C. §401(a), and that the trust was exempt from the federal income tax under 26 U.S.C. §501(a). From the adoption of the trust and plans in 1968 until March, 1971, the trustees administered the plans on a self-insured basis.

In late 1969 or early 1970, Kavner, at Gibbons' request, entered into negotiations with Occidental to provide increased

² The necessary approval was obtained from the Executive Board of Local 688 and the Board of Directors of LHI.

³ Plan A and Plan B were originally separate documents that were incorporated by reference into the Agreement and Declaration of Trust.

benefits for employees of Local 688, and to have Occidental "guarantee" the pension benefits of persons then employed by Local 688. After extensive negotiations, Occidental proposed a group annuity contract which provided that employees of Local 688 who met Plan B's eligibility requirements would be entitled to a monthly pension equal to \$40 multiplied by the number of years of their credited service, as defined by the plan, up to a maximum of thirty years. Under the original Plan B, an employee received benefits equal to \$300 per month for a period of sixty months after retirement and \$110 per month thereafter. Occidental also agreed to "guarantee" the benefits of Local 688 employees employed at the time the contract was executed. These individuals were listed on Exhibit B to the contract along with their service date and birth date. The guarantee, §3.7 of the contract, provides:

If the conditions of the Contract are met, or if Discontinuance of the Contract occurs after the conditions of the Contract have been met for the first twenty-five Contract Years, Occidental agrees to provide and guarantee all benefits which shall become payable under the Plan with respect to those Participants who are listed in the Schedule of Participants attached to the Contract as Exhibit B. For the purposes of this Section 3.7, and notwithstanding anything contained in the Contract to the contrary, the Contractholder and Occidental agree that the information and data contained in Exhibit B, as such Exhibit appears at the Contract Date, shall be binding and conclusive. Except as specified in this Section 3.7, Occidental shall not be responsible for the sufficiency of the Deposit Fund to provide the benefits specified in the Plan. Occidental shall have no liability except as provided in the Contract.

The Contractholder and Occidental agree to modify or amend the plan or the Contract appropriately, if such action becomes necessary because of any Federal or State law or regulation which becomes effective after the Contract

Date, and which imposes any condition, restriction, limitation or requirement on the operation of either the Plan or the Contract or both which, as determined by Mutual Agreement, would be such as to prevent Occidental from continuing its agreement under this Section.

Occidental agreed to provide these benefits if Local 688 contributed \$40 per week per active participant to the pension plan.⁴

In keeping with the unified administration of the LHI-688 Pension Plan, the group annuity contract also provided for benefits to LHI employees. Full-time LHI employees meeting Plan A's eligibility requirements were entitled to \$300 per month for a period of sixty months after retirement and \$110 per month thereafter. Part-time LHI employees were entitled to \$135 per month for a period of sixty months after retirement and \$90 per month thereafter. This was the identical level of benefits provided for in the original Plan A. Occidental did not guarantee these benefits. LHI was required to pay \$12 per week for each full-time employee and \$6 per week for each part-time employee to Occidental.

The trustees of the LHI-688 Pension Plan executed the group annuity contract on March 18, 1971. On the same day, they adopted amended Plans A and B retroactive to January 1, 1968.⁵ Under the amended plans, the funds previously accumulated in the trust were transferred to Occidental. The amended plans were submitted to and approved by the IRS.

⁴ The contribution rate was lower during the earlier years of the contract but gradually increased. In 1970, Local 688 was required to contribute \$22 per week per active participant; in 1971, \$28 per week; in 1972, \$34 per week; and in 1973 and thereafter, \$40 per week.

⁵ The two plans, although retaining distinct provisions, were incorporated into a single document.

Both LHI and Local 688 have continued to made the contributions required by the contract to Occidental.

Kavner retired on January 1, 1972, and in accordance with the service date specified in Exhibit B, received a pension of \$1,200 per month. Saffo retired on August 3, 1973, and received a pension of \$800 per month. Gibbons retired in August, 1973, shortly after he had been replaced as Secretary-Treasurer of Local 688 by Ronald Gamache, at a pension of \$1,200 per month.⁶

In the summer of 1973, the trustees decided to adopt amendments to Plan B to correct what they considered as shortcomings in the plan. They sought to increase the break-in-service period, provide for vesting and early retirement and reduce the number of years necessary for normal retirement. To pay for these changes, the trustees initially considered increasing the \$40 per week contribution of Local 688 for its employees. They rejected this option because they believed that Local 688 could not afford it. They then decided to reduce monthly pension benefits from \$40 per month to \$20 per month for each year of credited service.⁷ This reduction in monthly benefits was prospective in nature and affected only those individuals who retired after December 31, 1973. Consequently, the monthly benefits of Saffo, Kavner and Gibbons would not have been altered. The trustees incorporated all of these proposed changes into Amendment 2, which they adopted on November 29, 1973. The adoption was made conditional upon IRS approval.

⁶ Gibbons was forced to resign from his position as Secretary-Treasurer as a result of serious internal strife among the officers and staff of Local 688.

⁷ These figures were based upon information supplied by Occidental's actuaries.

On July 12, 1974, the IRS District Director for St. Louis notified the trustees that Plan B, if modified by Amendment 2, would no longer qualify as a tax-exempt plan. The letter to the trustees provided in relevant part:

[I]t is our opinion that these changes to your plan constitutes a curtailment or "partial termination" within the meaning of I. T. Reg. §1.401-6(b)(2).

The effect [that] a curtailment or partial termination will have on the qualified status of a plan depends primarily on (1) the existence of a valid business reason for the termination or curtailment consistent with the assumption that the plan from its inception has been a bona fide permanent program for the exclusive benefit of employees in general, and (2) compliance with the requirements of Section 401(a) of the Code in other respects from its adoption through curtailment.* * *

In the instant case, the plan was amended in 1970 [sic] to provide for the \$40 per month benefit for each year of service, and that in less than 4 years, the benefits were reduced (as were the Normal Cost figures thereunder) without evidence of business necessity. Absent this business necessity, the original assumption that the plan was a bona fide permanent program must be replaced with the presumption that the Union did not intend the plan to be permanent from the time the \$40 benefit was first added in 1970 [sic].

It is further noted that 3 of the 4 former employees who retired during this period were union officers,^{*} members of the class in whose favor discrimination is prohibited by Section 401(a)(4) of the Code, and that between January 1, 1970 and January 1, 1974 (prior to the amendment) the un-

^{*} The President of Local 688, John Naber, had also retired during this period. He is not, however, a party to this action.

funded liability had actually increased, indicating that the contributions made during that period were not sufficient enough to meet current years costs, i.e., normal cost plus interest on the unfunded liability. The presumption of permanency is even more difficult to accept in view of these facts.

Accordingly, it is our opinion that the recent amendment to Plan "B" is to be treated as a partial termination, that neither requirement [(1) or (2) above] was met, and that said amendment was adversely affected the prior qualification of the plan.

The trustees appealed this decision to the Commissioner of Internal Revenue, who affirmed the District Director on March 28, 1975.

On April 25, 1975, the trustees revised the service dates of Kavner and Gibbons as they appeared on Exhibit B. The trustees determined that Gibbons and Kavner had impermissibly attempted to claim service dates based upon years of employment with unions that later merged into Local 688 in addition to their years of employment with Local 688. The trustees also determined that Kavner had incurred a break in service, as defined in the LHI-688 Pension Plan, and, consequently, was not eligible to receive any pension benefits. These actions had the effect of retroactively reducing Gibbons' monthly benefit from \$1,200 to \$960.00 and of terminating Kavner's \$1,200 monthly benefit.

After the IRS rejected Amendment 2, the trustees proposed Amendment 4. Amendment 4 reduced the monthly benefit level for each year of credited service from \$40 to \$20.55, and reduced the maximum years of service that could be used in computing the monthly benefit from thirty to twenty-five years. The amendment was retroactive in nature and reduced the monthly benefit payments of all previous retirees as of their respective dates of retirement. Gibbons' monthly pension was reduced

from \$960.00 to \$493.20, and Saffo's monthly pension was reduced from \$800.00 to \$411.00. The trustees submitted the proposed amendment to the IRS for approval.

On August 11, 1975, the IRS approved the amendment. In a letter to the trustees, it stated:

You were previously advised that an unexecuted amendment submitted in 1974 would cause the above-named plan to fail of qualification under Section 401 of the Internal Revenue Code. The amendment proposed to reduce the normal retirement benefit for future service from \$40 to \$20 times years of service. Our objection to the reduction was made under Section 401(a)(4) of the Code because only four employees had retired during the period in which the \$40 benefit was in effect, and three of these employees were officers of the Union.

On July 11, 1975, a proposed amendment was submitted to reduce the benefit from \$40 to \$20.55 for each year of credited service, retroactively effective to November 1, 1970. This amendment, if adopted, will reduce the existing benefits now being paid to the four retirees. It will also necessitate the return of the excess amounts already paid since 1970, either as a direct repayment or as an actuarial adjustment against their respective future benefits. The amendment will thus remove the discriminatory treatment apparent in the first proposed amendment.

Accordingly, it is our opinion based on the data submitted that your recently submitted amendment to reduce the benefit retroactively to \$20.55 will not adversely affect the qualified status of the plan.

The trustees formally adopted Amendment 4 on September 9, 1975.

At a meeting held on the morning of September 24, 1975, representatives of Occidental informed the trustees that overpayments to the retirees for the period since their respective dates of retirement to September 1, 1975, were as follows:

Harold J. Gibbons ⁹	\$17,416.80
Richard Kavner ¹⁰	\$49,200.00
John Naber	\$16,880.00
Charles Saffo	\$14,393.00
John Nedich ¹¹	\$ 2,426.40

Occidental further advised the trustees that if each of the retirees' benefits, other than Kavner's, were reduced actuarially to provide for recoupment of the overpayments over a period of years, the reduction in benefits for each retiree would be calculated as follows:

	Reduced from (Monthly)	Reduced to by reason of Amend- ment No. 4 (Monthly)	Reduced to for actuarial repayment of overpayments (Monthly)
Harold J. Gibbons	\$960.00	\$493.20	\$357.11
John Naber	\$880.00	\$452.10	\$330.00
Charles Saffo	\$800.00	\$411.00	\$284.56
John Nedich	\$680.00	\$410.00	\$376.76

⁹ The amount of overpayment to Gibbons includes excess payments based upon his incorrect service date.

¹⁰ Since the trustees determined that Kavner had not been entitled to receive any pension, the amount of overpayment represents all sums paid to Kavner.

¹¹ John Nedich is not a party to this action. He retired subsequent to the conditional adoption of Amendment 2.

The trustees required Kavner to reimburse them in a lump sum.

The trustees held a special meeting on the afternoon of September 24, 1975. Gibbons, Naber, Saffo and Nedich attended the meeting. They were advised that it was necessary to reduce their benefits pursuant to Amendment 4, and that they would be required to reimburse the trustee either in a lump sum or by a further reduction in benefits. Gibbons and Saffo decided to reimburse the trustees by an actuarial reduction in benefits. It is unclear which option Naber and Nedich chose.

Gibbons, Saffo and Kavner instituted the present action in February, 1976, to have their pension benefits restored. The trial court found for them on the substantive issues. It held that the officers, trustees and Occidental had committed breaches of contract by reducing the payments to Gibbons and Saffo and by terminating the payments to Kavner. The trial court further held that Occidental was liable for actuarial malpractice and breach of contract for failing to inform the IRS of its guarantee and the effect of this guarantee on Plan B. It finally held that Occidental was liable for fraud, malpractice, breach of fiduciary duty and breach of contract for failing to inform the trustees that Amendment 4 would reduce its liability on the guarantee.

II.

Occidental's Arguments

Occidental raises several issues on appeal. Its arguments can be better understood if we first examine the analysis followed by the trial court in finding Occidental liable. It determined that under the contract Occidental had guaranteed the retirees' monthly benefits for life at the \$40 benefit level existent at the date of their retirement. It found that absent the guarantee, Plan B was actuarially unsound under the actuarial assumptions used by Occidental. Consequently, Occidental had assumed the risk of paying out more in benefits than it received in contributions

since it could not require increased contributions to pay Exhibit B participants. It held that, under the circumstances, Occidental was a risk taker and not a mere stakeholder.

The trial court also found that as of January 1, 1974, Occidental had incurred an actuarial liability on its guarantee of \$1,067,000, and that it had failed to reduce Plan B's unfunded actuarial liability by this amount in its actuarial reports to the trustees and in a valuation summary submitted to the IRS.¹² It concluded that the actuarial reports and valuation summary were misleading, deceptive and inaccurate, that they had caused the District Director of the IRS to question the actuarial soundness of Plan B in his July 12, 1974, letter to the trustees, and that they were a factor in the trustee's decision to adopt Amendment 4.

The trial court further found that Occidental knowingly failed to disclose to the trustees, in its reports to them, that Amendment 4 had the effect of reducing its actuarial liability on the guarantee by over \$800,000. It concluded that the reports were false and materially misleading, and that the trustees relied upon them in their decision to adopt Amendment 4.

The trial court held that Occidental was liable for actuarial malpractice and breach of its contract to provide actuarial services and reports. This holding was based on its failure to inform the IRS that it had guaranteed over \$1,000,000 of what it showed as the unfunded actuarial liability of Plan B. It also held Occidental liable for fraud, malpractice, breach of fiduciary duty and breach of its contract to provide services and reports for failing to inform the trustees that Amendment 4 would reduce its own liability by over \$800,000. It finally held that Occidental

¹² The valuation summary was requested by the IRS after the trustees had submitted Amendment 2 to the IRS for approval.

had committed breaches of contract in reducing its payments to Gibbons and Saffo and stopping its payments to Kavner.¹³

A.

The Guarantee

We initially consider Occidental's arguments that the trial court erred in its interpretation of the guarantee and the guarantee's relationship to the LHI-688 Pension Plan. Occidental first argues that the guarantee is not a promise by it to pay the retirees' monthly benefits for life at the \$40 benefit level existing at the date of their retirements. It contends that the guarantee only provides for payment of benefits "which shall become payable under the Plan," not fixed dollar amounts.

We find little merit to this argument. At the time the group annuity contract was executed, Plan B, as amended, provided that:

The amount of Normal Retirement Annuity for a participant in the employ of Teamsters Local 688 will be equal to \$40, multiplied by the number of years of Credited Service completed by the Participant at his Normal Retirement Date, up to a maximum of thirty years. Monthly payments of such Normal Retirement Annuity will commence on the Participant's Normal Retirement Date and will be payable thereafter for as long as he lives.

Occidental was fully aware of this \$40 benefit level, and it had based its guarantee and its contribution rate on that level. For

¹³ Occidental was found liable to the retirees based upon third-party-beneficiary principles.

example, a May 15, 1970, letter from a vice-president of Occidental stated that:

Our actuaries have stated that a benefit of \$40.00 per month for each year of service up to a maximum of 30 years can be provided by the following contributions:

Effective January 1, 1970 - \$22.00 per week

Effective January 1, 1971 - \$28.00 per week

Effective January 1, 1972 - \$34.00 per week

Effective January 1, 1973 - \$40.00 per week

In a September 8, 1970, letter acknowledging receipt of the names, birth dates and service dates of the Exhibit B participants, the same vice-president stated that this "will be the date upon which the proposed guarantee will be based."

Occidental next argues that the guarantee is not effective until the group annuity contract has been in force for twenty-five years. Neither the language of the guarantee nor the intent of the parties supports this argument. The language of the guarantee indicates that it was effective immediately and is to remain in effect as long as the other conditions of the contract are being met. The only mention of a twenty-five-year condition is in the first paragraph of the guarantee which states that even if the contract is discontinued after twenty-five years, Occidental will continue to pay benefits to Plan B participants. Moreover, the evidence shows that the officers of Local 688 were concerned with providing pension benefits to Exhibit B participants that would be guaranteed during their lifetimes. Occidental recognized this concern and attempted to provide for it in the guarantee. Since several individuals retired shortly after the guarantee was written, it is incredible to suggest that the negotiators for Local 688 would have been satisfied with the guarantee that would not take effect for twenty-five years.

Occidental also argues that the guarantee does not become effective until the Deposit Fund become exhausted. This fund contains the accumulated contributions of both Local 688 and LHI. The contract does not support this requirement.

Section 2.3 of the contract provides:

Occidental will notify the Contractholder if the Deposit Fund is not sufficient to permit any withdrawal required by Secion 3 with respect to any Participant who is not listed in the Schedule of Participants attached to the Contract as Exhibit B. The Contractholder will be required to make a Deposit sufficient to permit the withdrawal. The Deposit will be due on the date stated in the notice.

Under the interpretation urged by Occidental, the guarantee would effectively become a dead letter since the Deposit Fund cannot be exhausted. Occidental could merely use the fund to pay Exhibit B participants and then demand additional contributions for other participants in accordance with §2.3. In order to prevent this, the contract provides in §7.24:

Occidental shall furnish the Contractholder with the following reports * * *.

On a Contract Year basis:

* * * *

Actuarial Report—A report on the actuarial sufficiency of the funds maintained under the Contract. The report will indicate the level of Plan benefits which can be supported by the contributions which are being made in connection with the Plan. However, *nothing contained in the actuarial report can in any way alter the agreement evidenced in Section 3.7 [the guarantee].* (Emphasis added.)

In other words, if the contributions for Exhibit B participants are too small to pay Exhibit B retirees, it would be a violation of §7.24 for Occidental to use money contributed for non-Exhibit B employees to make up that deficit and then demand higher contributions for the non-Exhibit B people to make up for a resultant shortage in that account.

Occidental next argues that it could not pay the retirees' monthly benefits based on the \$40 benefit level without having several "conditions" embodied in the contract broken. The first of these is the condition that the plan be maintained as a qualified plan. Section 7.22 of the contract provides that:

[t]he [trustees agree] to keep and maintain the Plan as a qualified tax-exempt plan under the applicable code sections of the Internal Revenue Code and regulations and rulings of the Internal Revenue Service.

Occidental reasons that the IRS required the trustees to adopt Amendment 4 in order to remove plan discrimination in favor of union officials. Thus, it had no alternative but to reduce the benefit level from \$40 to \$20.55 so as to preserve the plan's tax-exempt status.

We do not agree that the IRS required the trustees to adopt Amendment 4. The July 12, 1974, letter from the IRS simply notes that Amendment 2, as adopted, was discriminatory under 26 U.S.C. §401(a)(4) because the three retirees, who were union officers, would be receiving higher monthly benefits than subsequent retirees. The IRS was concerned with the differential benefit structure and not the level of benefits per se. Nothing in the letter suggests that the trustees must reduce the monthly benefits in order to remove the discrimination and preserve the plan's tax-exemption. From what appears in this record, the IRS would not have objected if the trustees had rescinded their conditional adoption of Amendment 2 and returned to the original plan. Occidental obviously had an interest in not sug-

gesting this as an alternative because Amendment 4 reduced its liability under the guarantee.

The second of these is the condition that both LHI and Local 688 contributions were to be used as a common fund to support all pension benefits under either Plans A or B. Occidental asserts that in 1975, the trustees directed it to separate Plans A and B because the IRS had objected to the "pooling" of contributions in order to support Local 688 pensions. It contends that this action deprived it of the single fund and, in effect, abrogated §2.1 of the contract which provides that:

[I]n no event shall the amount payable to Occidental under the Contract be any less than the sum of the contributions which are payable with respect to all Participants under the Plan [which includes employees of both LHI and Local 688].

We agree with the trial court that the evidence does not support this contention.

At trial, Occidental attempted to prove that pooling was necessary in order to sustain the benefit levels requested by Local 688. Richard Eskoff, a vice-president of Occidental, related his experiences in negotiating the contract. He stated that after the initial meetings with Kavner in late 1969 and early 1970, Occidental proposed a pension program in May, 1970, with benefits almost identical to those provided under the original plan. Given the same benefit level, the various representatives of the LHI-688 Pension Plan saw no advantage in accepting the proposal. It was at that point that pooling was discussed as an alternative.¹⁴ Occidental then reworked the contract so as to produce a higher benefit level. In doing so, it utilized contributions made on behalf of LHI to fund the higher benefits of

¹⁴ Eskoff could not recall who suggested the idea first.

Local 688.¹⁵ Thus, it argues that pooling was an essential element of the contract.

This account is simply unsupported by the actuarial evidence. In its May, 1970, proposal, Occidental calculated the following contributions for LHI:

	<u>Full-time employees</u>	<u>Part-time employees</u>
Effective January 1, 1970	\$12.00 per week	\$6.00 per week
Effective January 1, 1971	\$13.00 per week	\$7.00 per week
Effective January 1, 1972	\$14.00 per week	\$8.00 per week

These contributions would have supported benefits for full-time employees of \$300 per month for the first sixty months after retirement and \$110 per month thereafter for life; and for part-time employees of \$120 per month for the first sixty months and \$44 per month thereafter.

In the final contract, the contributions were *less* than in the proposal:

Full-time employees \$12.00 per week

Part-time employees \$ 6.00 per week

The benefits for full-time LHI employees, however, were the same as in the proposal, and the benefits for part-time employees actually *increased* to \$135 per month for sixty months and \$90 per month thereafter. Considering this evidence, we fail to see how Occidental can claim that there were excess LHI contributions to, in effect, subsidize Local 688

¹⁵ Occidental also notes that in IRS Form 4573, the Application for Determination of tax-exempt status, the trustees indicated that Local 688 would not be supplying all of the contributions necessary to provide benefits.

benefits when the LHI contributions were less and the benefits greater under the "pooled" contract than under the segregated one.

The third of these conditions is the requirement in §3.1 of the contract which provides that:

Occidental shall make withdrawals from the Deposit Fund and to provide benefits under the Contract only as directed by the Contractholder.

Occidental claims that the trustees directed it to pay benefits based on the \$20.55 level and that it would violate the contract if it did otherwise. This contention is merely a variation of Occidental's argument that it was not required to pay each of the retirees' monthly benefits at the \$40 level because it had only promised to pay benefits "which shall become payable under the Plan." For the reasons previously discussed, we find little merit in this contention.

Occidental's final argument in regard to the guarantee is that the trial court's finding that Occidental's guarantee had a value of \$1,067,000 for actuarial purposes was clearly erroneous. See *United States v. United States Gypsum Co., Inc.* 333 U.S. 364, 395 (1948); *Nye v. Blyth Eastman Dillon & Co., Inc.*, 588 F.2d 1189, 1196 (8th Cir. 1978); *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). We conclude that it is not.

Louis G. Prange, an actuary, prepared an estimated present value of the shortfall in Local 688 contributions compared to the value of benefits to be paid to Exhibit B participants. The present value of the shortfall indicates the cost to Occidental of its guarantee to Exhibit B participants. His calculations were based on assumptions and cost methods similar to those of Occidental and were as follows:

Year	Present Value of Benefits	Allocated Share of Assets	Present Value of Future Employer Contributions for Schedule B Participants	Present Value of Shortfall (1) - (2) - (3)
1970	\$1,215,000	\$ 33,000	\$365,000	\$ 818,000
1971	\$1,698,000	\$ 71,000	\$617,000	\$1,010,000
1972	\$1,745,000	\$134,000	\$586,000	\$1,026,000
1973	\$1,734,000	\$187,000	\$516,000	\$1,043,000
1974	\$1,695,000	\$221,000	\$406,000	\$1,067,000

Thus, at the time the contract was issued, Occidental apparently anticipated a loss of approximately \$800,000, which amount increased to \$1,067,000 in 1974.

Occidental asks us "to take judicial notice that insurance companies do not give away \$1,000,000." We need not make a lengthy inquiry into Occidental's motives for its actions. We do note, however, that some evidence was presented at trial indicating that Occidental anticipated a higher rate of employee turnover than provided for in its actuarial calculations which would have reduced its potential liability. Moreover, Occidental may have desired to accomodate Gibbons because it handled several other pension plans involving Local 688 and the International.¹⁶ As a vice-president in the International and as the Secretary-Treasurer of Local 688, Gibbons could have adversely affected Occidental's arrangements with these plans if he became displeased with Occidental.¹⁷

¹⁶ Occidental also handled the Teamsters Negotiated Pension Plan, a multi-employer pension plan, and the Teamsters Insurance and Welfare Fund. See *Celeste M. Castello v. Ron Gamache, et al.*, No. 78-1755, slip op. at 1-2 (8th Cir., March 9, 1979).

¹⁷ Occidental also argues that it would be improper, under 26 U.S.C. §412(c)(2), for it to include the \$1,067,000 as a pension plan asset. Insofar as the trial court did not require it to do so, we need not decide the issue. Louis Prange suggested several alternative methods of disclosing the value of the guarantee.

B.

Remaining Arguments

Occidental argues that the trial court was clearly erroneous in finding that Plan B was actuarially unsound under the actuarial assumptions used by Occidental excluding the guarantee. Occidental concedes that Plan B was actuarially unsound absent the pooling of Plans A and B.¹⁸ We have previously concluded that pooling was not an intergral part of the contract. Consequently, it is unnecessary to us to address this argument further.

Occidental raises several arguments concerning the trial court's findings of breach of contract, malpractice, fraud and breach of fiduciary duty. It contends that these findings are clearly erroneous, reiterating many of the arguments it made with respect to the guarantee. We have carefully examined these arguments and find them to be without merit.

Occidental finally argues that if it is held liable in damages for complying with IRS-required changes to the LHI-688 Pension Plan, it was deprived of due process. As we have previously concluded that the IRS did not require these changes, we find this argument to be without merit.

Plan Year	Plan B	
	Minimum	Expected
1970	\$115,784	\$30,888
1971	\$138,413	\$72,800
1972	\$119,734	\$83,096
1973	\$113,091	\$81,120
1974	\$131,523	\$87,360

¹⁸ Louis Prange demonstrated that expected contributions of Local 688 were significantly less than the minimum funding necessary to sustain the benefit level. His calculations were as follows:

III.

The Remaining Appellants' Arguments

The trustees of the LHI-688 Pension Plan and the officers of Local 688 raise several additional issues on appeal. They argue, initially that the trial court erred in determining that the trustees acted in violation of the plan and the trust agreement when, in accordance with Amendment 4, they directed Occidental to change payments to the retirees.¹⁹ The trustees and officers contend that the retirees' pension rights were merely contractual and are governed by the terms of the plan documents. Since Plan B allowed the trustees to amend it, the retirees' rights could be adversely affected at a later date, provided that the trustees acted reasonably and in a manner consistent with the purposes of the trust agreement and the plan. When the IRS disqualified the plan and found it to be severely underfunded, the trustees were confronted with a situation that endangered the plan's survival. Under the circumstances, they argue it was appropriate and reasonable for them to adopt Amendment 4, and that their judgment should not be overturned by the trial court.

We disagree with the analysis of the trustees and officers. The retirees' pension rights are not as amorphous as they suggest. Ordinarily, pension rights, once they have vested, may not be altered without the pensioner's consent.²⁰ *Allied Chemical &*

¹⁹ They do not contest the trial court's findings that the trustees were under the domination and control of Local 688 and that Local 688 permitted the trustees to change retirees' payments.

²⁰ Section 203(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1053(a), sharply limits the situations in which vested rights can be divested. *Henry Winer v. Edison Brothers Stores Pension Plan*, No. 78-1327, slip op. at 7-8 (8th Cir., Feb. 21, 1979). ERISA §203(a) is not applicable to this case, however, since the

Alkali Workers v. P. P. G. Co., 404 U.S. 157, 181 n.20 (1971); See Note, *Pension Plans and the Rights of the Retired Worker*, 70 COLUM. L. REV. 909, 916-920 (1970). The retirees' pension rights were vested as they had complied with all conditions entitling them to participate in the plan²¹ and had begun to receive benefits under it. See *Molumby v. Shapleigh Hardware Company*, 395 S.W.2d 221, 227 (Mo. Ct. App. 1965); *Feinberg v. Pfeiffer Company*, 322 S.W.2d 163 (Mo. Ct. App. 1959).²² Moreover, the trustees' ability to divest a retiree of his pension benefits was strictly limited by §10.5 of the pension plan which provides that:

[i]n no event may any amendment be made to the Plan which:

* * * *

(b) will divest any Participant of any benefit credited to him under the Plan before the effective date of the amendment, except as the same may be required by the U.S. Internal Revenue Service as a condition of preserving the Trust's Federal tax exempt status.

decision to reduce or terminate retirees' benefits occurred prior to January 1, 1976. See *Henry Winer v. Edison Stores Pension Plan*, *supra* at slip op. 9-12.

²¹ We conclude later in the opinion, however, that Kavner did not meet the plan's eligibility requirement and that he and Gibbons committed fraud with respect to their service dates.

²² ERISA §514(a), 29 U.S.C. §1144(a), preempted all state law as it might relate to any employee benefit plan, with a few exceptions, effective January 1, 1975, although ERISA §203(a) did not become effective until after December 31, 1975. Note 19, *supra*. During this "gap" period, however, we may properly look to pre-ERISA state law. See *Keller v. Graphic Systems of Akron, Inc.*, 422 F.Supp. 1005, 1007-1009 (N.D. Ohio 1976). But see *Amory v. Boyden Associates*, 434 F.Supp. 671 (S.D. N.Y. 1976).

We also disagree with the trustees and officers that the IRS ever disqualified the plan. The August 11, 1975, letter from the IRS speaks of the "unexecuted amendment" that "would cause the above-named plan to fail of qualification." Our fundamental problem with their analysis, however, is the implication that there is a causal connection between the plan's underfunding and a disqualification. The IRS did not suggest that the plan would be disqualified unless the trustees corrected the underfunding. In fact, the trial court found that the trustees were unreasonable in concluding that the IRS required them to reduce retirees' benefits in an amount sufficient to make the plan actuarially sound in order to maintain the plan's qualification. This finding is not clearly erroneous.

The IRS commented on the actuarial soundness of the plan during its analysis of whether the increase in Local 688 benefits, occurring in 1971, was intended to be a permanent part of the plan or whether it was intended to be a temporary increase designed primarily to benefit former union officers. It observed that the plan's unfunded liability had increased between January 1, 1970, and January 1, 1974. It implied that, since this situation could not go on indefinitely, Amendment 2 was simply another step in an overall plan to reward the former union officers by increasing benefit levels during the period of their retirement.²³ The IRS concluded that if Amendment 2 were adopted, the plan would be disqualified. It did not, however, condition the plan's continued qualification on the removal of any underfunding.

We also observe that the trustees could not have adopted those portions of Amendment 4 which divested the retirees of their pension rights without violating §10.5 of the plan unless the IRS required them to do so in order to preserve the plan's

²³ The IRS did not have before it the evidence showing that the plan was not actuarially unsound since Occidental had guaranteed the benefits of Exhibit B participants. See Part II.A., *supra*.

tax-exempt status. We conclude that the IRS did not. As we have previously observed in Part II.A., there is no language in either letter from the IRS to suggest that the plan would be disqualified unless the trustees reduced the retirees' pension benefits. The August 11, 1975, letter merely notes that Amendment 4 eliminated the objectionable features of Amendment 2. The trustees could have rescinded their conditional adoption of Amendment 2 and returned to the original plan.²⁴

The trustees and officers finally argue that several other findings of the trial court are clearly erroneous. To understand these arguments, we set out in some detail additional information concerning Gibbons' and Kavner's employment background.

Gibbons was first employed by the American Federation of Teachers in Chicago in the early 1930's. In 1936, he became the Assistant Director of the CIO in Chicago. From 1937 until 1940, he was Subregional Director of the Textile Workers Union in Louisville, Kentucky. He was assigned by the Textile Workers to work in Kansas City, Missouri, in 1940. In 1941, he was hired

²⁴ There is some suggestion in the trial court's decision that Amendment 4 was not adopted in good faith. The evidence does indicate some self-dealing on behalf of the new officers of Local 688. An unknown portion of the reduction in benefits was attributable to changes in the plan that were unnecessary to correct either the underfunding or the impermissible discrimination. Amendment 4 not only reduced retirees' pensions, it (1) increased the break-in-service provisions from twelve months to forty-eight months; (2) reduced the minimum service necessary to qualify from twenty years to fifteen years; (3) provided for early retirement at age fifty with ten years of service; and (4) provided for early vesting. The only individual who benefited from increasing the break-in-service provision to forty-eight months was Ronald Gamache, the new Secretary-Treasurer of Local 688. Moreover, there is no evidence that Amendment 4 actually eliminated the purported underfunding.

as the Chief Executive Officer of the St. Louis Joint Board of the International Retail, Wholesale and Department Stores Employees Union, CIO. In 1948, he was instrumental in disaffiliating the St. Louis Joint Board from the International Retail, Wholesale and Department Store Employees Union. The St. Louis Joint Board continued as an independent organization until 1949, when it merged with Local 688. Prior to the merger in 1949, the St. Louis Joint Board had no affiliation with the Teamsters. Local 688 preexisted the merger and was separate and distinct from the St. Louis Joint Board. Thus, Gibbons' first employment by Local 688 was in 1949.

Kavner was employed by the International Retail, Wholesale and Department Store Employees Union, CIO, from 1939 until 1942, when he entered the armed services. In 1946, Kavner returned and was reemployed by the same organization. In the latter part of 1946, Kavner was assigned by the International to St. Louis. He remained in St. Louis until the merger in 1949, at which time he, too, was first employed by Local 688.

From February, 1954, until January, 1955, Kavner worked on a special organizing program with the Missouri-Kansas Conference of Teamsters and from February, 1955, until February, 1958, he worked as a "trouble shooter" for the Central States Conference. Kavner received a written leave of absence for Local 688 for both assignments. From March, 1958, through December, 1963, Kavner was employed by the Teamsters as a General Organizer. During this period, his salary, expenses and fringe benefits were paid by the International. He did not receive a written leave of absence for this assignment.

On the basis of the merger of the St. Louis Joint Board with Local 688, Gibbons and Kavner claimed service dates from 1938 and 1939, respectively, on Exhibit B. The trustees and officers argue that in doing so, Kavner and Gibbons perpetrated a fraud on the plan. The trial court found that they had not committed any fraud. We conclude that this finding is clearly erroneous.

At the time Gibbons and Kavner retired, there was no plan provision that authorized credit for past service with any employer other than Local 688. Section 1.11(a) of the plan provides:

Credited Past Service—Each Employee who is in the employ of the Employer on the Effective Date will be credited with one year of Credited Past Service for each calendar year prior to the Effective Date in which he had at least 300 hours of continuous employment as an Employee or ten week in the armed forces of the United States.

An "Employee" is defined as an employee of Local 688 under Plan B. Gibbons and Kavner were aware of this provision yet they claimed past service credits from 1938 and 1939, respectively, although 1949 was the earliest date Local 688 had employed either of them. Moreover, employees of other merged unions were not given credited service for years of employment prior to their employment directly by Local 688.

The trustee also determined that Kavner suffered a break in service within the meaning of Plan B from March, 1958, through December, 1963, when he was employed as a General Organizer for the International. Consequently, he did not meet the plan's eligibility requirements for benefits. The trial court found that Kavner did not have a break in service. We conclude that this finding is clearly erroneous.

The plan provided that an employee's credited service would be broken if he left the service of Local 688 for a period of at least fifty-two consecutive weeks unless the employee has been granted a leave of absence in writing in a manner consistently and uniformly applied to all other employees or was in the armed forces of the United States. Kavner contends that he was granted an oral leave of absence by Gibbons when he accepted employment as a General Organizer. It is clear, however, that the plan requires a written leave of absence in order to avoid a

break in service. Kavner was aware of this requirement and had obtained written leaves of absence when he had accepted other positions outside of Local 688. Moreover, since other employees suffered breaks in service upon receiving transfers to other Teamster organizations, allowing Kavner to utilize an oral leave of absence would violate the plan's requirement of uniform and consistent application.²⁵

We conclude that under the circumstances, the trustees acted reasonably in reducing Gibbons' monthly benefit from \$1,200 to \$960 because of his decrease in years of credited service, and in discontinuing Kavner's \$1,200 monthly benefit because of his break in service and seeking to recover the related overpayments.²⁶

IV

Conclusion

The trial court's decision with respect to Saffo is affirmed. Its decision with respect to Gibbons is affirmed insofar as it relates to the decrease in the monthly benefit level, and reversed insofar as it relates to the reduction in benefits due to the incorrect service date. Its decision with respect to Kavner is reversed.

²⁵ Kavner will continue to receive deferred compensation from Local 688 of \$720 per month, \$300 per month from the Central States Pension Fund, \$1,046 per month from the Affiliates Pension Plan, \$108 per month from the Banquet Foods Pension Plan, \$1,300 per month from Labor Management Service Corporation, \$300 per month from Local 102 and \$300 per month from Council Plaza Redevelopment Corporation.

²⁶ Due to our disposition of the case, it is unnecessary for us to determine whether Kavner's retirement was merely a sham.

With respect to the damage issues, the trial court indicated that it was inclined to order payments of back benefits due, declare the rights of the parties under the pension plan and order continued payment of the monthly benefits. In that event, Saffo would be entitled to receive a monthly payment of \$800 and Gibbons would be entitled to receive a monthly payment of \$960. Occidental would make these payments out of the assets of Plan B and, in accordance with its guarantee, would be liable for any deficiencies. Saffo and Gibbons would also be entitled to receive back payments. The trial court also permitted the parties to agree upon a proper amount of damages, including a lump sum representing the present value of the retirees' benefits. The parties obviously retain this option.

The decision of the trial court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Each party shall bear its own costs.

BENSON, Chief District Judge, concurring in part and dissenting in part.

I concur in the holding that the trustees acted reasonably in reducing Gibbons' monthly pension from \$1,200 to \$960 because of the decrease in his years of credited service, and in discontinuing Kavner's pension because of a break in service. Further, I would concur in a holding that the trustees had no authority to reduce Gibbons' and Saffo's monthly pensions to implement Amendment 4 unless such reduction was required to maintain the plan as a qualified plan, but will offer a further comment on the effect of such a holding. With respect to the holding of liability on the part of Occidental, I respectfully dissent.

When the trustees approached Occidental to negotiate the payment of benefits under a group annuity contract, they were interested in obtaining a benefit level that was more advan-

ageous than under the original plan. Occidental's first set of figures provided for a level of benefits that was almost identical to the original plan. This proposal was not acceptable to the trustees, so the pooling of the LHI-688 Plan funds was discussed. It is immaterial who initiated the discussion. It is clear that only the employees of Local 688 stood to gain from pooled funding, and that it was the trustees who pursued the idea. Occidental's actuaries prepared a second proposed schedule of contributions and level of benefits based upon a pooled method of funding. Under this proposal, Local 688 retirees would receive a monthly pension of \$40 per year of credited service, a figure which was considerably higher than the benefit level under the original plan.¹ The trustees accepted this proposal and incorporated the \$40 benefit level into Plan B. The proposed schedule of employer contributions, which was also based upon pooled funding, was attached to the group annuity contract as Exhibit C and made a part thereof.

Both Occidental and the trustees expressed serious doubt as to whether the IRS would approve the LHI-688 Plan on a pooled funding basis. The trustees were responsible for filing an application with the IRS for a determination of tax-exempt status. Prior to the submission of the plan to the IRS, Occidental wrote to the trustees to confirm that the legal and binding effect of the group annuity contract was contingent upon IRS approval of the LHI-688 Plan. The trustees fully intended to submit the LHI-688 Plan to the IRS as a single plan with a common fund, but with different benefit and contribution levels for the two sub-plans. However, rather than filing a single application, they filed separate applications for determination as to Plans A and B. The applications indicated that not all of the contributions

¹Occidental informed the trustees that Plan B would not be actuarially sound if it were isolated from Plan A, and that a considerably higher contribution rate would be necessary if Local 688 contributions were to fully support the \$40 benefit level for Local 688 employees.

were to be paid by the employer in question, and the schedule of contributions (Exhibit C to the group annuity contract) was submitted as an explanatory reference. The explanation on the applications may not have been clear to the IRS because it issued separate determinations approving tax-exempt status for Plans A and B without comment on the fact that a pooled method of funding was being utilized. The trustees informed Occidental that the LHI-688 Plan had been approved, and both Occidental and the trustees thereafter proceeded on the assumption that the IRS had approved the pooled funding. Whether or not pooled funding was appropriate for the LHI-688 Plan, the evidence clearly and overwhelmingly shows that the trustees and Occidental both considered pooled funding to be a basis of their bargain, and that it was an integral part of the group annuity contract.

Under §3.7 of the group annuity contract, Occidental guaranteed (1) during the first 25 years of the contract, to pay the pensions of the Exhibit B retirees to the extent the schedule of contributions was insufficient to support the level of benefits under the plan, provided all employer contributions were made as scheduled; and (2) if the contract were discontinued after 25 years, and all conditions had been met during that time, to pay the entire pensions of the Exhibit B participants.

If, at any time during the first 25 years of the contract, the amount in the deposit fund were insufficient to pay the full benefit owed to all retirees, the amount in the fund would be prorated among the retirees in proportion to the amounts of their monthly pensions. Occidental would then be required, under its guarantee, to pay the balance of the benefits owed to Exhibit B retirees, and the employer would be required to make a deposit sufficient to pay the balance of the benefits owed to non-Exhibit B retirees.

The trial court adopted as its finding the opinion of plaintiffs' expert, Louis G. Prange, that Occidental's guarantee had an ac-

tuarial value of approximately \$800,000 at the time the contract was executed, which value increased to over \$1,000,000 by 1974. This "value" represented the amount by which the present value of Local 688 contributions for Exhibit B participants was exceeded by the present value of benefits to be paid to Exhibit B participants, without taking into account any pooling of the funds of Plans A and B.

It is undisputed that Plan B standing alone was never actuarially sound. The Local 688 contribution schedule prepared by Occidental was never intended to fully support the benefit level for Local 688 employees. Pursuant to the parties' agreement, Occidental's actuaries prepared the schedule of contributions and benefit levels on a pooled funding basis.

Under the evidence, Occidental had no reason to suspect that the IRS had not approved the LHI-688 Plan as a pooled fund. The first indication to Occidental that the IRS had not granted such approval came in 1974 when the IRS requested segregated financial data for Plan B in connection with its consideration of Amendment 2. Under these circumstances, Occidental did not act inappropriately in calculating the contribution schedules and benefit levels on a pooled funding basis.

Occidental did not have an anticipated loss of approximately \$800,000 at the time it entered into the contract. The intent of the parties was that the guarantee constituted an undertaking on the part of Occidental to pay benefits to the Exhibit B retirees to the extent the pooled fund could not support the payment of such benefits. It is undisputed that the LHI-688 Plan was never actuarially unsound when considered as a pooled fund. Consequently, there was no basis for the assignment of an actuarial value to Occidental's guarantee. The trial court's findings with respect to the actuarial value of the guarantee are clearly erroneous.

The trial court's findings of breach of contract, malpractice, fraud and breach of fiduciary duty on the part of Occidental are

also clearly erroneous. The evidence clearly shows that the problems which arose from the "purported underfunding" of Plan B stemmed from the trustees and not from Occidental. The trustees' applications to the IRS did not indicate clearly that a pooled method of funding was being employed.² The IRS apparently did not become aware of the pooled funding until Amendment 2 was submitted in 1974. The trustees' adoption of Amendment 4 was motivated in part by the IRS's questioning of the financial soundness of Plan B. The adoption of Amendment 4 in turn resulted in the reduction of Gibbons' and Saffo's pensions.

²The IRS "Application for Determination" form included three categories to describe the plan's employer contribution formula: "All," "Balance necessary," and "Other (Specify)." The trustees checked the "other" category and designated Exhibit C to the group annuity contract as the explanation of the formula.

Exhibit C provided:

SCHEDULE OF PARTICIPANT CONTRIBUTIONS
(as referred to in Section 2.1 of Contract)

Scale of contributions payable under the Plan as of January 1, 1970 with respect to each active participant in the Plan:

As to St. Louis Labor Health Institute—

Full-time employees	\$12.00 per week	per active participant
Part-time employees	\$ 6.00 per week	per active participant

As to Teamsters Local 688—

Calendar year 1970	\$22.00 per week	per active participant
Calendar year 1971	\$28.00 per week	per active participant
Calendar year 1972	\$34.00 per week	per active participant
Calendar year 1973	\$40.00 per week	per active participant

This was the only explanation in the application as to how the LHI-688 Plan was funded.

The trustees' adoption of Amendment 4 was also motivated in part by their desire to increase the number of Local 688 employees who would be eligible for benefits, particularly themselves. I agree that the trustees had no authority to reduce Saffo's and Gibbons' pensions to implement Amendment 4. However, the effect of this part of the court's holding deserves further comment. A review of the history of Plan B will be helpful to this discussion.

Under the original version of Plan B, employees would receive a pension of \$300 per month for the first 60 months of their retirement and \$110 per month thereafter. In 1971, the plan was amended to increase monthly benefits to \$40 per year of credited service. Amendment 2, which would have gone into effect on January 1, 1974 if approved by the IRS, provided for reduction of the monthly benefit level from \$40 to \$20 per year of credited service for all future retirees. Thus, it would not have applied to the four employees who had retired while the \$40 benefit level was in effect, including Gibbons, Kavner and Saffo.

In ruling on Amendment 2, the District Director of the IRS held that the reduction of benefits after only a short time, without evidence of business necessity, created a presumption that the plan was not intended to be permanent from the time the \$40 benefit level was added. The District Director also noted the unfunded liability of Plan B had been increasing, and that three of the four employees who had retired at the \$40 benefit level were union officers, members of the class in whose favor discrimination is prohibited by 26 U.S.C. §401(a)(4). Amendment 2 was held to be a partial termination of Plan B, which would adversely affect the plan's qualification.

The trustees appealed this decision to the Commissioner, who affirmed the adverse ruling both as to lack of business necessity and as to the discriminatory effect of the amendment. However, the Commissioner ruled the discrimination question was dispositive, stating:

As it turns out, the \$40 per month rate obtains only during a relatively short period of time and benefits primarily officers of the Employer rather than employees in general.

Thus, it is our conclusion that the partial termination of the Plan resulting from Amendment No. 2 produced discrimination of the type prohibited by section 401(a)(4) of the Code. In this regard, it is immaterial whether or not there was a valid business reason for the partial termination, and whether or not Plan A and Plan B are treated as one plan or as separate plans.

The trustees subsequently adopted Amendment 4, which provided for a reduction of monthly benefits from \$40 to \$20.55 per year of credited service for all employees, including those who had already retired under the \$40 level. When Amendment 4 was submitted for IRS approval, the District Director held that if the "excess" amounts already paid to the retired employees were recouped, Amendment 4 would remove the discriminatory treatment that had been apparent in Amendment 2, and would not adversely affect the plan's qualification. Thereafter, Amendment 4 was put into effect, and the trustees began to recoup the "overpayments."

Under the court's holding, Gibbons and Saffo will be entitled to monthly benefits of \$40 per year of credited service, just as they were prior to the adoption of Amendment 4.³ Employees who retire after the effective date of Amendment 4 will be entitled to monthly benefits of \$20.55 per year of credited service as provided by Amendment 4. The effect of the court's holding is to limit Amendment 4 to prospective application, just as Amendment 2 was intended to do. And, as was the case with Amendment 2, the \$40 rate will primarily benefit officers of Local 688. Thus, the court's holding will reinstate the discriminatory effect that was present in Amendment 2.⁴

In order to preserve the plan's qualification as a tax-exempt plan, the trustees will have no choice but to eliminate the

discrimination through revocation of Amendment 4 and reinstatement of the \$40 benefit level for all Local 688 employees. Because a pooled method of funding is no longer being used, a substantial increase in Local 688's contributions to the plan will be required to support the higher level of benefits. There is substantial evidence in the record which indicates that Local 688 will not be able to afford this increase in contributions and may be forced to abandon the plan.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

³Other employees who retired prior to the effective date of Amendment 4 will also be entitled to reinstatement of their pensions at the \$40 rate. This, of course, does not include Kavner. His pension was discontinued because of a break in service, not because of Amendment 4.

⁴Such discrimination is prohibited by 26 U.S.C. § 401(a)(4), and is also contrary to § 10.5 of the LHI-688 Plan, which provides in part:

In no event may any amendment be made to the Plan which:

* * *

- (c) will cause or effect any discrimination in favor of officers or individuals whose principal duties consist of supervising the work of others, or highly compensated employees.

Occidental Life Insurance Company of California is hereby authorized to withdraw from the Deposit Fund the amount necessary to provide the Participant's monthly annuity. It is understood that in the event the Participant has elected Early Retirement ~~ANY/NOBODY~~ ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ he will be provided with the amount of monthly annuity which can be provided by the actuarial equivalent, as determined by Occidental, of the amount of monthly annuity indicated above.

L.H.I. -638
THE TRUSTEES OF THE ~~XXXXXXXXXXXXXXXXXXXX~~
PENSION TRUST FUND

By *[Signature]* Date: 12/1, 1941
By *[Signature]* Date: 12/13, 1941
PARTICIPANT'S Signature: *[Signature]*